## **United States Department of Labor Employees' Compensation Appeals Board**

| TZ C. A. a. Illand  |   |
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| K.S., Appellant   | )   |
| and   | ) Docket No. 12-883<br>) Issued: October 25, 2012 |
| DEPARTMENT OF THE NAVY, CMDR, NAVAL INTL-INACTIVE FACILITY, | )<br>)<br>)                                       |
| San Diego, CA, Employer                                     | _ )   |
| Appearances: Appellant, pro se                              | Case Submitted on the Record                      |
| Office of Solicitor, for the Director                       |   |

## ORDER REMANDING CASE

## Before:

RICHARD J. DASCHBACH, Chief Judge COLLEEN DUFFY KIKO, Judge PATRICIA HOWARD FITZGERALD, Judge

On March 13, 2012 appellant filed a timely appeal of a December 28, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied his request for reconsideration. The appeal was docketed as No. 12-883.

OWCP's December 28, 2011 decision determined that the evidence submitted in support of appellant's request for reconsideration of OWCP's May 16, 2011 decision was insufficient to warrant a merit review. It noted that in the May 16, 2011 decision, an OWCP hearing representative affirmed a November 4, 2010 loss of wage-earning capacity decision. The December 28, 2011 decision noted the requirements for modifying a wage-earning capacity determination but concluded that the evidence and arguments submitted in support of the request for reconsideration were cumulative, a standard typically used in considering whether to grant a merit review from a timely reconsideration request. As the underlying issue is modification of a wage-earning capacity determination, appellant's request should not be treated as a

<sup>&</sup>lt;sup>1</sup> See e.g., James W. Scott, 55 ECAB 606 (2004).

reconsideration request but should be adjudicated as a request for modification of a wage-earning capacity determination.<sup>2</sup>

Section 8124(a) of FECA provides: OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.<sup>3</sup> Its regulations at section 10.126 of Title 20 of the Code of Federal Regulations provide: The decision of the Director of OWCP shall contain findings of fact and a statement of reasons.<sup>4</sup> Moreover, OWCP's procedure manual provides: The reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.<sup>5</sup>

The Board, having duly considered the matter, finds that OWCP's December 28, 2011 decision fails to properly explain the findings with respect to the issue presented. The decision states that a merit review was not conducted yet also sets forth the standard for determining whether a wage-earning capacity determination should be modified. OWCP appears to have both analyzed appellant's request as a timely request for reconsideration, under 5 U.S.C. § 8128(a), for which merit review was not granted and also analyzed the merits of whether the wage-earning capacity determination should be modified. As noted, since the underlying issue is modification of a wage-earning capacity determination, appellant's request should not be treated as a reconsideration request but should be adjudicated as a request for modification of a wage-earning capacity determination. Thus, OWCP, in its December 28, 2011 decision, did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that appellant could understand the basis for the decision, *i.e.*, whether he met his burden of proof to show modification of the loss of wage-earning capacity determination.

The case must be returned to OWCP for a proper decision which includes findings of fact and a clear and precise statement regarding appellant's request for modification of a wage-earning capacity determination. Following this and such further development as OWCP deems necessary, it shall issue an appropriate merit decision.

<sup>&</sup>lt;sup>2</sup> See F.B., Docket No.10-99 (issued June 21, 2010); M.J., Docket No. 08-2280 (issued July 7, 2009).

<sup>&</sup>lt;sup>3</sup> 5 U.S.C. § 8124(a); see Hubert Jones, Jr., 57 ECAB 467 (2006); Paul M. Colosi, 56 ECAB 294 (2005).

<sup>&</sup>lt;sup>4</sup> 20 C.F.R. § 10.126. *See also O.R.*, 59 ECAB 432 (2008); *Teresa A. Ripley*, 56 ECAB 528 (2005); *M.L.*, Docket No. 09-956 (issued April 15, 2010).

<sup>&</sup>lt;sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4(e) (March 1997).

**IT IS HEREBY ORDERED THAT** the December 28, 2011 decision be set aside and the matter remanded to the Office of Workers' Compensation Programs for further proceedings consistent with this order of the Board.

Issued: October 25, 2012 Washington, DC

> Richard J. Daschbach, Chief Judge Employees' Compensation Appeals Board

> Colleen Duffy Kiko, Judge Employees' Compensation Appeals Board

> Patricia Howard Fitzgerald, Judge Employees' Compensation Appeals Board